IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M1 of 2018
B E T W E N:

THE QUEEN Appellant

v.

DENNIS BAUER (A PSEUDONYM) (No.2) Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT[1]

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PART I: SUITABILITY FOR INTERNET PUBLICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

Ground 1 (Recording)

2. **'Willingness'** (CPA s 381(1)(c)) means **'preparedness'**: COA [41]; RS [15].
3. The prosecution **did not discharge its burden** of establishing that it was in the 'interests of justice' to admit the recording: CPA ss 379 and 381. That was because:
   (a) A **preference** not to give evidence **does not amount to an absence of willingness** to do so: COA [43]; AFM 74-75; RFM 119-120; RFM 143; and
20 (b) There was no **evidentiary basis** to establish lack of willingness: COA [41]-[42]; RS [16].
4. A **substantial miscarriage of justice** has resulted: RS [19].

Ground 2 (Tendency)

5. The Court below's use of the term **'special features'** did not reflect a misunderstanding of the law. Rather, it was **a term used to sum up** the detailed matters of law that had been set out, **and to emphasise the high threshold** which evidence must surpass in order to be admissible as tendency evidence. The Court:
   (a) Was **cognisant of the relevant principles**, including that the purported tendency evidence had to be considered together with all of the evidence; and

[1] The following abbreviations are used herein: Judgment of the Court below ('**COA**'); Appellant's submissions filed 2.2.18 ('**AS**'); Respondent's submissions filed 2.3.18 ('**RS**'); Appellant's reply filed 23.3.18 ('**AR**'); Respondent's reply filed 3.4.18 ('**RR**'); *Criminal Procedure Act* 2009 (Vic) ('**CPA**'); *Evidence Act* 2008 (Vic) ('**EA**').

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(b) **Considered the law relating to single source/single complainant cases** given: *first*, the way the learned trial judge had reasoned in Ruling No 2 (COA [64]-[65]); and *secondly*, the reasoning in those cases was relevant due to the Court's ultimate conclusion that this was effectively a single source case.

6. The Court below **did not mistake the nature of the case**, or the evidence: COA [63]. The Court:

(a) Was **aware the appellant relied upon TB's evidence** as supportive: COA [76]; and

(b) **Rejected that submission**: COA [82]. The vagueness of TB's evidence meant it was not admissible as tendency evidence, and there was no other support of RC's account. This was effectively a single source case.

Additional reasons why inadmissible as tendency evidence:

7. Any probative value was not such as to outweigh the **prejudice** side of the ledger to the degree required: EA ss 101, 135 and 137; RS [35]. Matters relating to **credibility** and **reliability** have application to the prejudice side of the ledger in ss 101, 135 and 137: RS [34]; ***R v XY*** (2013) NSWLR 363, [14]; ***IMM v The Queen*** (2016) 257 CLR 300, [57].

8. Further and in the alternative:

(a) The real possibility of **concoction, collusion, collaboration or contamination** may deprive tendency evidence of significant probative value: ***R v GM*** [2016] NSWCCA 78, [100]-[115] and [131]-[133]; ***Murdoch v The Queen*** (2013) 40 VR 451, [7] and [99]. This was such a case: RS [36]-[37].

(b) Alternatively, the possibility of concoction, collusion, collaboration or contamination can be relevant to the **prejudice** side of the ledger in applying EA ss 101, 135 and 137: ***IMM v The Queen*** (2016) 257 CLR 300, [57]; ***R v XY*** (2013) NSWLR 363, [14].

(c) There was **significant prejudice** in this case such that the evidence did not meet the test in s 101, or should have been excluded pursuant to ss 135 and 137: RS [33]-[37].

9. In addition, **reasonable notice** in writing was not provided as required: EA s 97(1)(a); RS [31]. That was because:

(a) The notice **did not clearly specify** which charged acts and uncharged acts could be relied upon in respect of which purpose. It was unclear and contradictory.

(b) The **timing** of the service of the notice was not reasonable.

(c) The notice **did not comply** with the requirements of reg 7(1)(b) of the *Evidence Regulations* 2009 (Vic) as to form (as EA s 99 requires).

Ground 3 (Severance)

10. The **presumption** (in CPA s 194(2)) that charge 2 be tried with the other charges was **rebutted,** and the learned trial judge should have ordered that charge 2 be tried separately: CPA s 193(1); RS [38]-[39]. That was so given (among other things) the lack of cross-admissibility (which the prosecution conceded) and the strong possibility that the jury would use the evidence impermissibly: COA [94]-[95] and [99].

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Ground 4 (Complaint)

11. RC's representations to AF were ***prima facie*** **inadmissible**: EA s 59.

12. The prosecution did not establish the representations were '**fresh in the memory**' of RC: EA s 66; COA [112]-[113]; RS [43].

13. In any event, those representations **should have been excluded** pursuant to s 137: RS [46]; COA [113].

Cross-Appeal

14. There is **no presumption in favour of a retrial** being ordered when an appeal succeeds.
20 The discretion conferred by CPA s 276(1) must be exercised in accordance with the overall justice of the case, taking into account all of the relevant facts and circumstances: ***King v The Queen*** (1986) 161 CLR 423, 426-427; ***Cheatley v The Queen*** (1981) Tas R 123, 137-138; ***DPP (Nauru) v Fowler*** (1984) 154 CLR 627, 630.

Costs

15. The **circumstances of this appeal are exceptional**, such that the Court ought exercise its general and unfettered discretion (*Judiciary Act* 1903 (Cth), s 26; High Court Rules 2004 (Cth), r 50.01) to award costs to the respondent: ***Queen v Whitworth*** (1988) 164 CLR 500, [3]; ***Latoudis v Casey*** (1990) 170 CLR 534, 542.

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Dated the 13th day of June, 2018

C. A. BOSTON P.J. SMALLWOOD